

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DICK L. STEVENS**

Claimant

VS.

**SHERWIN WILLIAMS COMPANY**

Respondent

Self-Insured

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Docket No. 244,779

**ORDER**

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge John D. Clark dated June 24, 1999.

**ISSUES**

Respondent requested Appeals Board review of the issues regarding whether notice was timely given, whether the alleged work-related accident and resulting injury arose out of and in the course of claimant's employment with respondent, and whether temporary total disability benefits are due.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the preliminary hearing record and considered the briefs of the parties, the Appeals Board finds as follows:

Except for the issue of whether claimant is temporarily and totally disabled, the Appeals Board has jurisdiction to review these preliminary hearing issues pursuant to K.S.A. 1998 Supp. 44-534a(a)(2) and K.S.A. 1998 Supp. 44-551(b)(2)(A).

Claimant has not established that he gave timely notice of accident pursuant to K.S.A. 44-520.

Claimant has worked for respondent approximately 26 years. He claims injuries to his low back resulting from a series of accidents which he alleges occurred from April 26 through May 3, 1999. During that time claimant was working under light duty restrictions from a prior back claim. On April 26, 1999 he was instructed by his supervisor, Edward Browning, to help unload a drum truck. Claimant testified that the drums weighed somewhere around 53 to 60 pounds. He performed this work for about an hour and a half

despite having a restriction against lifting over 35 pounds.<sup>1</sup> Claimant described having pain in his low back and hip afterwards. Nevertheless, nothing was said to his supervisor and claimant continued working until May 3, 1999. During this time, his pain got worse. While he was at home getting ready for work on the morning of May 3, 1999, claimant coughed and felt a real sharp pain to his lower back. He went to work but lasted only about an hour. Claimant said he had to physically pull a 300 gallon tank weighing 3,000 pounds onto a hydraulic lift. The tank was on wheels. He again experienced sharp pains in his lower back. Claimant says he went to Mr. Browning "and I said I hurt myself and I think I need to see a doctor." Claimant then left work and went to see his personal physician, Dr. H. Richard Kuhns, in El Dorado, Kansas. Dr. Kuhns took claimant off work, and claimant has not worked since.

Mr. Browning also testified. He has been a supervisor for respondent for 29 years. The past 10 to 12 years he has been claimant's supervisor. He was aware that claimant had restrictions from a prior workers compensation injury. According to Mr. Browning, he has never asked claimant to exceed those restrictions. He recalled that on claimant's last day at work, which was Monday, May 3, 1999, claimant came up to him and reported that he was having problems with his back and needed to go home. Mr. Browning asked claimant what happened and claimant said "he had coughed at home and hurt his back and needed to see the doctor." Mr. Browning filled out the necessary paperwork for claimant to leave work. That paperwork, dated May 3, 1999, is attached as Exhibit F to the preliminary hearing transcript. It shows claimant requested vacation leave for an "accident off duty." Mr. Browning's handwritten entry reads "Left at 7 AM - Said he coughed at home & hurt his back. Thought he would be able to work today but could not stand pain. Went to Doctor - called back & said he would be off rest of wk. Goes back to doctor Thursday."

Dr. Kuhns' office records were also placed into evidence. His notes for the May 3, 1999 office visit make no mention of a work-related injury.

Here today with complaints of low back pain. It has been present now for the last 4 to 5 hours. He apparently woke up early this morning, coughed fairly hard, then felt fairly intense back pain radiating down the right leg. He tried to go to work but about half way through the morning had to quit working because of the pain. He says it is actually a little better now but still fairly intense. He is feeling some pain in his heel as well. He has had a lot of problems with the L4-L5 disk in the past.

Claimant also saw Dr. Kuhns on May 6, 10, 12 and 19. Dr. Kuhns' records for those examination dates likewise fail to mention work as the cause of claimant's condition. Although claimant testifies differently, Dr. Kuhns' records indicate that it was not until

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<sup>1</sup> But claimant also testified that after he was given work restrictions in 1992 his employer modified his job duties and have since kept him within his work restrictions.

June 9, 1999 that claimant mentioned anything to Dr. Kuhns about his condition being work related.

Claimant has had prior workers compensation claims with respondent. In 1992 claimant discussed with Dr. Stein having back surgery, but decided against it at that time. Claimant has gone to respondent before and requested authorized medical treatment. Each time respondent provided a doctor. Claimant testified that he knew from his other workers compensation claims that if he hurt himself on the job he was supposed to go to a company physician. The fact that claimant did not request respondent to provide treatment this time but instead went to his personal physician supports Mr. Browning's version of events and argues against claimant's allegation that he attributed his injury to his activities at work. It further argues against a finding that claimant reported his injury as work related.

K.S.A. 44-520 provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant alleges his accident occurred from April 26, 1999 through May 3, 1999. The Appeals Board finds that the first notice claimant gave to respondent that he was alleging his injury to be work related was the Application for Hearing form dated June 1, 1999. Accordingly, claimant failed to give notice within 10 days of the initial accident and, from the record as it currently exists, failed to give notice within 10 days of his last day worked. There is some testimony to the effect that claimant failed to report his accident and did not seek medical treatment from his employer under workers compensation because he thought he would be fired. But claimant does not argue, either at preliminary hearing or in his brief, that there was just cause for his failure to give notice within 10 days. Since "just cause" is not alleged, we do not need to address it here. Also,

we do not reach the issues concerning whether claimant suffered injury by accident and, if so, whether claimant's injury arose out of and in the course of his employment with respondent. The Appeals Board finds claimant failed to give timely notice of accident as required by K.S.A. 44-520. Accordingly, the Order of the Administrative Law Judge should be reversed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order by Administrative Law Judge John D. Clark dated June 24, 1999, should be, and the same hereby is, reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1999.

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BOARD MEMBER

c: James B. Zongker, Wichita, KS  
Larry Shoaf, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director